1963 *Present:* **Sansoni, J., and L. B. de Silva, J.**

TRUSTEE, CHEVALIER CHRISTIAN GOMES CHARITABLE TRUST, Appellant, *and* DEPUTY COMMISSIONER OF INLAND REVENUE, Respondent

S. C. 6/63—Income Tax Case No. BRA/320

Income Tax Ordinance (Cap 242)—Sections 6 (1) (a) to (h), 6 (1A), 7C—" Any offertory, subscription or other donation to a charitable institution "—Trusts Ordinance (Cap. 87), s. 6.

Section 6 (1A) of the Income Tax Ordinance, as amended by Act No. 44 of 1958, reads as follows :

> " Any offertory, subscription or other donation to a charitable institution shall be deemed to be such income as is referred to in paragraph (h) of sub-section (1). "

By deed No. 1897 of 4th November, 1960, a person, who was entitled to certain immovable property, constituted himself and three others to be the Trustees of that property and transferred it to himself and three others in trust for certain uses and purposes, subject to certain conditions and restrictions recited in the deed. The trust thereby created was admittedly a trust established for a charitable purpose.

Held, that the transfer of the property under deed No. 1897 was not a donation within the meaning of section 6 (1A) and, therefore, was not liable to tax.

CASE stated under section 78 of the Income Tax Ordinance.

H. V. Perera, Q.C., with *S. Ambalavanar* and *C. Pathmanathan*, for the Assessee-Appellant.

V. S. A. Pullenayegum, Crown Counsel, with *H. L. de Silva*, Crown Counsel, for the Respondent.

Cur. adv. vult.

December 13, 1963. SANSONI, J.—

By deed No. 1897 dated 4th November 1960 Chevalier Christian Gomez, who was entitled to a ½ share of certain immovable property in Kandy, constituted himself and three others to be the trustees of that share and transferred it to himself and three others in trust for certain uses and purposes, subject to certain conditions and restrictions recited in the deed. The Trust thereby created was to be called the Chevalier Christian Gomez Charitable Trust, and it is not in dispute that it is a Trust established for a charitable purpose.

The share in question was valued at Rs. 150,000 in the deed. The transfer of the property to the trustees was treated by an assessor under the Income Tax Ordinance as a donation to a charitable institution and taxed accordingly for the year of assessment 1961-62. Appeals by the trustees to the Commissioner of Inland Revenue and to the Board of Review respectively were dismissed, and the matter has now come before us on a case stated upon the application of the trustees.

Under the Income Tax Ordinance, Cap. 242, the words " profits " and " income " are defined in section 6. In section 6 (1) (*a*) to (*g*) certain categories of profits and income are specified, and section 6 (1) (*h*) adds " income from any other source whatsoever, not including profits of a casual and non-recurring nature."

The income of a public charitable institution or trust, or a religious body or institution, used to enjoy exemption from tax by reason of section 7 (1) (*d*) and (*e*). The Income Tax (Amendment) Act, No. 44 of 1958, however, made certain amendments to the principal Ordinance. Section 6 (1A) which was added immediately after Section 6 (1) provided that " Any offertory, subscription or other donation to a charitable institution shall be deemed to be such income as is referred to in paragraph (*h*) of sub-section (1)." Further, section 7 of the principal Ordinance was amended by the omission of clauses (*d*) and (*e*) of section 7 (1).

The appellants contended always that these amendments did not render the transfer of the property under deed No. 1897 taxable (1) because it is not a *donation* within the meaning of section 6 (1A), and (2) because there was no charitable institution in existence when the deed was executed. On the first point, I think the words " Any offertory, subscription or other donation " point only to donations of a particular type being made taxable. I cannot ascribe any other reason for the specific mention of offertories and subscriptions. An offertory could be described as an offering in money or kind made by the faithful as part of a religious ceremony. A subscription is generally a contribution of money made when funds are being raised for a particular purpose. Whether the offertory is in money or kind, when it is associated with a subscription, there is one characteristic common to both types of voluntary contribution and it is that they are intended to be expended on the purposes of the trust and not to be preserved intact. The words " other donation " in

this context were added, I think, in order to include all voluntary contributions in money or kind not falling within the meaning of " offertory " or " subscription ", but which are expendable.

This view is supported by the fact that Act No. 44 of 1958 which introduced this novel category of income also introduced exemptions from the tax in new section 7C. By that section any sum of money which consisted of an offertory, subscription or other donation to a charitable institution, or the proceeds of sale of any movable property donated to a charitable institution for conversion into money by the sale thereof, were exempted from the tax if such sum was spent on a charitable purpose of that institution. Single donations of not less than Rs. 1,000, or donations of several sums aggregating to not less than Rs. 10,000, which were made in order to be spent on a charitable purpose, were also exempted from the tax if they could not be spent within a prescribed time. Exemption had to be claimed and obtained for this purpose from the Commissioner of Inland Revenue, and if no such exemption was obtained the unspent portions of the donation were taxable. It is reasonable to conclude that the amending Act contemplates only donations which are expendable.

Again, gifts of large sums of money, or valuable movables, and possibly even of immovable property could fall within the class of taxable donations, though it is not necessary to decide all these questions on this appeal. Even if immovable property comes within the expression " other donation ", immovable property which is subject to a trust would not be included, as such property is not convertible into money and is of a nature completely different from an " offertory " or a " subscription ". We are dealing with an Income Tax Ordinance, that is to say, an Ordinance to enable tax to be levied on income, including a new category of income comprising profits of a casual and non-recurring nature such as offertories and subscriptions and other donations. I cannot bring myself to take the view that the value of lands donated subject to a trust and subject to the condition that they shall not be sold, mortgaged, leased or encumbered, should be treated as income or profits. That would be to entertain " a fanciful notion foreign altogether to the scope and intent of the Income Tax Code ", to use the words of Lord Macnaghten in *Tennant v. Smith*[1]. I would prefer to avoid producing such a harsh result. A far more reasonable result can be produced by giving to the word " donation " in this context an interpretation which does not offend one's sense of justice.

[1] *(1892) A. C. at 162.*

The other argument urged for the appellants was that the words " donation to a charitable institution " can only mean a donation to an institution already existing at the time of the donation. Under section 2 of the amending Act " charitable institution " means " the trustee or trustees of a trust, or a corporation or an unincorporate body of persons, established for a charitable purpose only or engaged solely in carrying out a charitable purpose". If one reads section 6 (1A) along with this definition it follows that the donation to be taxable must be a donation to trustees of a trust established for a charitable purpose. One cannot have a donation to trustees of a trust that has not yet been established, any more than one can have an offertory or subscription to a non-existent trust ; and at the time this particular deed was executed, there was no trust in existence. It was only on the appointment of the trustees and the transfer of the lands to them that there came into existence a charitable institution as defined in the Act. The amending Act proceeds on the footing that there is an existing charitable institution to which a gift is made ; but the same deed cannot both create a charitable institution and also be a gift to an existing charitable institution.

The Trusts Ordinance, Cap. 87, enacts in section 6 that a trust is created (omitting the other requirements) when the author of the trust transfers the trust property to the trustee. Under this section a trust was created by the execution of deed No. 1897. The Amending Act No. 44 of 1958 did not make a transfer of property which created a trust taxable. The question is not whether the deed is a donation impressed with a charitable trust but whether it is a donation to a charitable institution. I would hold for this reason also that the deed in question is not a donation covered by section 6 (1A).

For these reasons I would hold that the order of the Board of Review is wrong, and that the transfer in question was not liable to tax. The appellants are entitled to their costs of this appeal.

L. B. DE SILVA, J.—I agree.

Appeal allowed.